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In the Supreme Court of the United States

OCTOBER TERM, 1968

No. 1152

SOUTHERN PACIFIC COMPANY, a Delaware Corporation,
Appellant,

vs.

PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA; PETER E. MITCHELL, WILLIAM M. BENNETT, A. W. GATOV, WILLIAM SYMONS, JR., and FRED P. MORRISSEY, as members of, and constituting said Commission; THOMAS C. LYNCH; JOHN J. FERDON; KEITH C. SORENSON; and LOUIS K. BERGNA,
Appellees.

On Appeal from the United States District Court for the Northern District of California

Jurisdictional Statement of Appellant Southern Pacific Company

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SOUTHERN PACIFIC COMPANY, a Delaware Corporation,
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PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA; PETER E. MITCHELL, WILLIAM M. BENNETT, A. W. GATOV, WILLIAM SYMONS, JR., and FRED P. MORRISSEY, as members of, and constituting said Commission; THOMAS C. LYNCH; JOHN J. FERDON; KEITH C. SORENSON; and LOUIS K. BERGNA,
Appellees.

On Appeal from the United States District Court for the Northern District of California

Jurisdictional Statement of Appellant Southern Pacific Company

Appellant, pursuant to United States Supreme Court Rules 13(2) and 15, files this statement of the basis upon which it is contended that the Supreme Court of the United States has jurisdiction on a direct appeal to review the

final order of the district court dismissing appellant's complaint, and should exercise such jurisdiction in this case.

OPINIONS BELOW

The unreported opinion and order of the Public Utilities Commission of the State of California (herein sometimes referred to as the "Commission") in Decision No. 74006 are dated April 16, 1968, and copies thereof are attached hereto as Appendix A. The unreported final order of the United States District Court, Northern District of California in No. 50166, entered November 18, 1968, here sought to be reviewed, which granted appellee's motion to dismiss appellant's complaint to enjoin the above Commission order and denied appellant's motion for a preliminary injunction, is attached hereto as Appendix B. The district court delivered no written opinion. The related final order of the Supreme Court of California in No. 22610 of September 25, 1968, which denied appellant's petition for a writ of review to review the same Commission order, is reported in the Advance California Reports, 69 A.C. No. 9, No. 1 of the Minutes, and a copy thereof is attached as Appendix C hereto. A companion appeal by appellant to this Court from that order of the California Supreme Court is also pending, which is also entitled *Southern Pacific Company v. The Public Utilities Commission of the State of California,* and was docketed as No. 1050 on February 17, 1969.

JURISDICTION

The appeal herein is from a final order entered by a three-judge United States District Court for the Northern District of California specially constituted under 28 U.S.C. §§ 2281 and 2284. In its complaint in this case appellant sought to enjoin the Commission's order imposing a con-

tempt fine upon appellant on the two-fold grounds that the California consfitutional and statutory provisions authorizing the Commission to punish for contempt and without a jury violated its rights under the federal constitution and that various aspects of the Commission's conduct in the contempt proceedings violated appellant's rights to a fair hearing under the fourteenth amendment to the federal constitution. In the involved final order the court granted appellee's motion to dismiss and denied appellant's motion for a preliminary injunction, but did not indicate the grounds for its action.

The final order appealed from was entered on November 18, 1968. Notice of appeal was filed in the United States District Court for the Northern District of California on January 14, 1969.

The Supreme Court of the United States has jurisdiction to review by direct appeal the order complained of by the provisions of 28 U.S.C. §§ 1253 and 2101 (b)

The following decisions are believed to sustain the jurisdiction of the Supreme Court to review the order on direct appeal in this case: *Herkness v. Irion,* 278 U.S. 92 (1928); *Florida Lime Growers v. Jacobsen,* 362 U.S. 73 (1960).

The California statutes involved in this appeal are §§ 1756 - 1760, California Public Utilities Code, which prescribe the method and scope of judicial review of Commission orders by the California Supreme Court, and read as follows:

§ 1756. Writ of certiorari

Within 30 days after the application for a rehearing is denied, or, if the application is granted, then within 30 days after the decision on rehearing, the applicant may apply to the Supreme Court of this State for a writ of certiorari or review for the purpose of having

the lawfulness of the original order or decision or of the order or decision on rehearing inquired into and determined. The writ shall be made returnable * * * *at a time and place then or thereafter specified by court order* and shall direct the commission to certify its record in the case to the court *within the time therein specified.*

§ 1757. Scope of review

No new or additional evidence may be introduced in the Supreme Court, but the cause shall be heard on the record of the commission as certified to by it. The review shall not be extended further than to determine whether the commission has regularly pursued its authority, including a determination of whether the order or decision under review violates any right of the petitioner under the Constitution of the United States or of this State. The findings and conclusions of the commission on questions of fact shall be final and shall not be subject to review except as provided in this article. Such questions of fact shall include ultimate facts and the findings and conclusions of the commission on reasonableness and discrimination.

§ 1758. Appearances; judgment; applicability of Code of Civil Procedure

The commission and each party to the action or proceeding before the commission may appear in the review proceeding. Upon the hearing the Supreme Court shall enter judgment either affirming or setting aside the order or decision of the commission. The provisions of the Code of Civil Procedure relating to writs of review shall, so far as applicable and not in conflict with the provisions of this part, apply to proceedings instituted in the Supreme Court under the provisions of this article.

§ 1759. Jurisdiction

No court of this State, except the Supreme Court to the extent specified in this article, shall have jurisdic-

tion to review, reverse, correct, or annul any order or decision of the commission or to suspend or delay the execution or operation thereof, or to enjoin, restrain, or interfere with the commission in the performance of its official duties, except that the writ of mandamus shall lie from the Supreme Court to the commission in all proper cases.

§ 1760. Constitutional questions

In any proceeding wherein the validity of any order or decision is challenged on the ground that it violates any right of petitioner under the Constitution of the United States, the Supreme Court shall exercise an independent judgment on the law and the facts, and the findings or conclusions of the commission material to the determination of the constitutional question shall not be final.

QUESTIONS PRESENTED

Prior to filing the complaint in the federal district court in the instant case appellant filed a petition with the California Supreme Court seeking judicial review by that court, pursuant to the foregoing statutory writ of review procedure, of the Commission's order imposing a contempt fine upon appellant. Substantially the same two-fold types of contentions were raised in this petition to the California Supreme Court as were raised in the instant proceedings before the federal district court, namely: (1) that the giving to the Commission of the power to punish for contempt and without a jury trial violated appellant's federal constitutional rights;[1] and (2) that in various respects the contempt proceedings before the Commission deprived appellant of a fair hearing and procedural due process under the four-

1. Appellant is seeking to secure judicial review of the first type of issues in its pending companion appeal (No. 1050) from the California Supreme Court's decision.

teenth amendment to the federal constitution. The California Supreme Court summarily denied the writ of review without bringing up the record of the Commission in its contempt proceedings for review by the Court. Believing that judicial consideration of such record or of evidence outside the record was necessary for a proper review of its procedural due process contentions, appellant filed this suit in the federal district court, raising both types of issues. In its order sought to be reviewed the district court merely granted appellee's motion to dismiss and denied appellant's motion for a preliminary injunction, but without opinion or any indication of the grounds of its decision. The principal questions presented are:

(1) Whether the California Supreme Court's action in summarily dismissing appellant's petition for a writ of review without bringing up the record of the contempt proceedings before the Commission and in thus depriving appellant of independent judicial review on constitutional factual issues relating to procedural due process, in itself deprived appellant of its property without due process of law in violation of the fourteenth amendment to the federal constitution.

(2) Whether, in any event, the absence of the Commission's record in the record before the Supreme Court of California, rendered an appeal from such decision to the United States Supreme Court an inadequate remedy to secure judicial review on the issues of procedural due process, so that the federal district court's action in summarily dismissing appellant's complaint and application for injunctive relief without reviewing such issues on the basis of the Commission's record was an abuse of equitable discretion.

(3) Can a state statute, consistent with the due process requirements of the fourteenth amendment to the federal

constitution, authorize a state administrative agency to exercise judicial power to adjudge a party guilty of criminal contempt, and impose substantial criminal penalties pursuant to such conviction?

(4) Can a state statute, consistent with the due process requirements of the fourteenth amendment to the Constitution of the United States, authorize a state administrative agency to exercise judicial power to convict a party of criminal contempt and impose substantial and serious criminal penalties, without affording the alleged contemner an opportunity for a trial by jury?

STATEMENT OF THE CASE

The pertinent facts, as alleged in the complaint before the district court, may be summarized as follows:

Appellant, a common carrier by railroad, owns 17 individual parking lots adjacent to its railroad stations on the San Francisco Peninsula at and between San Francisco and San Jose, California, which are so located as to be suitable for use as vehicular parking areas for the use of appellant's patrons in connection with commuter service provided by appellant between those points. These lots have an aggregate fair market value in excess of $3,500,000 and ad valorem taxes accrue on said properties in the amount of $86,539 per annum, or aproximately $1,625 per week. With the exception of the parking areas located at Sunnyvale, Mountain View and San Carlos, the Commission had not purported to assert jurisdiction over appellant's parking areas and operations prior to October 10, 1967.

In order to provide modern and convenient parking facilities for the use of its patrons, and others, appellant began, in September of 1967, a comprehensive program to improve all of its Peninsula parking areas. To recover for the cost of improving and operating said areas, and the

taxes applicable thereto, parking fees were charged. By October 10, 1967, appellant had already expended sums in excess of $50,000 pursuant to its improvement program, and was charging parking fees at its Peninsula parking areas of San Jose, Sunnyvale, San Mateo, Santa Clara, Hillsdale, Menlo Park and Palo Alto, at which locations all improvements had been completed. Appellant anticipated that improvements would be completed and the charging of parking fees would be commenced at the remainder of its Peninsula parking areas by October 20, 1967.

By a purported "temporary restraining order" issued October 10, 1967, the Commission ordered appellant to refrain indefinitely from charging parking fees at its Peninsula parking areas. The Commission's action was in response to the single complaint filed with it by the City of San Carlos, conplaining only of the proposed future imposition of parking fees in the City of San Carlos. The basis of the Commission's action as to the other 16 locations was anonymous, unverified allegations and memoranda in the Commission's confidential files, which information has at all times been unavailable to appellant. The injunction was issued *ex parte,* without notice, without hearing, and was of indefinite duration. The effect of this order was to require appellant to throw open to the general public all of its Peninsula parking areas for free public parking.

Appellant believed in good faith that the purported injunction was absolutely void under California law,[2] and unsuccessfully sought a writ of prohibition from the Cali-

2. Under California statutes, all mandatory orders of the Commission must be supported by evidence taken at Commission hearings (California Public Utilities Code §§ 1704-1706); when ex parte restraining orders are desired in advance of hearings, they are issued at the request of the Commission by a court of general jurisdiction in the county affected pursuant to specific provisions of the Public Utilities Code (California Public Utilities Code §§ 2102 and 2103).

fornia Supreme Court. Nevertheless, appellant complied with the temporary restraining order insofar as it prohibited appellant from extending its pay parking system to the balance of Peninsula parking areas. Appellant also continued collection of parking fees at those areas where pay parking had been instituted prior to the Commission's order of October 10, 1967. Appellant's failure wholly to comply with the order resulting in the institution of a criminal contempt proceeding by the Commission, at which appellant was ordered to show cause why it should not be held in contempt of the Commission's order of October 10, 1967. The show cause order dated November 15, 1967, was issued in response to the public accusation of Commissioner William M. Bennett that appellant was guilty of contempt, which accusation was made before any evidence of the alleged contempt was of record.

Commissioner Bennett was assigned by the Commission to preside at the contempt hearing, notwithstanding the fact he had previously prejudged the issue against appellant and had publicly stated that appellant was in fact guilty of contempt. During the course of the criminal contempt proceeding, Commissioner Bennett participated as both prosecutor and presiding officer. Thereafter, he actively participated in the deliberations of the Commission, which culminated in the Commission's order of April 16, 1968 (Appendix A) finding appellant guilty of criminal contempt and assessing a fine of $22,000, the maximum fine permissible for the number of counts contained in the show-cause order. On the same day the Commission in another order acknowledged appellant's right to charge for parking at all of its involved stations pendente lite, and authorized the collection of a charge set on an interim basis at 25 cents per day.

Appellant has contended that the following aspects of the Commission's contempt proceedings deprived it of its constitutional right to a fair hearing under the due process clause:

The bias of Commissioner Bennett: In this connection appellant filed two motions with the Commission seeking to have Commissioner Bennett disqualified for bias, a statutory affidavit of prejudice and a motion for disqualification for cause, both of which were denied by the Commission. (Affidavit of John MacDonald Smith, counsel for appellant in the contempt proceedings, Document D-4 in the record on appeal, pp. 7-8). The first was based on the following statement made to appellant's counsel by Commissioner Bennett on November 6, 1967, prior to the show-cause order of November 15, 1967, on the record in related proceedings before the Commission involving the permissible amount of parking fees, upon being apprised of the fact that appellant had not discontinued its parking charges pending the seeking of a writ of prohibition from the Supreme Court of California:

> "Well, so far as I am concerned I would recommend to the full Commission that we find the Southern Pacific in full contempt, but we will take that up with the Commission tomorrow." (D-4, pp. 6-7)

The second motion referred to certain extra judicial statements made by Commissioner Bennett, including newspaper reports of his public ridicule of another member of the Commission who had declined to sign the order to show cause (D-4, p. 8, Appendix E thereto).

Action of Commissioner Bennett as both prosecutor and hearing officer in the contempt proceedings: As indicated in Document D-4, pp. 8-11: After counsel for the Commission had rested his case in the contempt proceedings, Com-

missioner Bennett asked counsel for appellant to produce appellant's president at the hearings. Appellant's counsel declined to do so on the ground that the order to show cause was directed only against appellant and not its officers. Thereupon Commissioner Bennett directed counsel for the Commission to obtain a subpoena from the Commission's secretary to bring appellant's president before him. This was done over appellant's objections. When appellant's president appeared at the hearing, counsel for the Commission indicated that the Commission's staff had no questions to submit to him. Commissioner Bennett then directed the Commission's counsel to develop on the record as a public attorney in this proceeding the connection of appellant's president with this "seeming violation of the Commission's order." After a few questions of appellant's president by counsel for the Commission, Commissioner Bennett took over the interrogation, an interrogation which ranged far afield from the issue of alleged contempt, and covered advertising of passenger trains, why appellant sought to disqualify him from presiding, and whether appellant played any part in the screening or selection of potential public utility commissioners.

Denial to appellant of right to confront its accusers, to introduce evidence, to cross-examine its accusers and to know the basis on which the Commission acted in issuing the ex parte restraining order. Basically, this involved a denial to appellant of the right to prove its defense to the restraining order at the contempt hearing. At this hearing it developed that, except for a single complaint pertaining to appellant's lot at San Carlos, the basis of the Commission's restraining order was miscellaneous information such as telephone calls, and reports of Commission employees; that such information was either unrecorded or in some

confidential Commission file which was not available to the public or appellant for inspection.[3]

Appellant raised each of the above contentions having to do with procedural due process in its petition for a writ of review of the contempt order to the Supreme Court of California. Without bringing up the Commission's record in these contempt proceedings so that it could provide an independent review of the underlying facts alleged, the California Supreme Court, summarily, without opinion, denied the petition in its order of September 25, 1968 (Appendix C). It is settled that such summary denial of review without opinion is, nevertheless, a decision on the merits both as to the law and facts presented in the review proceedings. *People v. Western Air Lines, Inc.*, 42 Cal. 2d 621, 630-31; 268 P. 2d 723 (1954). Appellant in No. 1050 has, of course, taken an appeal to this court from the above decision of the California Supreme Court, but the Commission's record, in view of the summary denial of the petition, is not before this court in the record on that appeal, and the appeal was limited to the question of the constitutionality of statutes giving the Commission power to punish for contempt and without a jury. As previously indicated, before taking an appeal to this court, appellant raised in its complaint in the instant proceedings before the district court (D-1), these same issues of procedural due process and also the contentions that the statutory giving of the Commission power to punish for contempt and without a jury trial violated substantive due process. Again appellant's suit was summarily dismissed without opinion on a motion to dismiss and without the taking of

3. The detailed allegations of fact on this contention appear in appellant's petition for a writ of review to the Supreme Court of California, to review the contempt order which is in the record before this court in No. 1050 (pp. 11-12, 31-35).

any evidence or bringing up the record before the Commission for the court's review. We do not know the exact reason for such action but presume the court concluded that appellant had an adequate legal remedy with respect to securing judicial review of the facts and law pertaining to these issues of procedural due process by taking an appeal to this court from the order of the California Supreme Court denying the writ of review. Whatever the reasons, the fact remains that the district court's action effectively deprived appellant of independent judicial review of the Commission's record dealing with the facts concerning appellant's charges of deprivation of procedural due process in violation of the federal constitution.

THE QUESTIONS ARE SUBSTANTIAL

I. The Failure of the Supreme Court of California to Provide an Independent Judicial Review of the Truth of Appellant's Factual Allegations Concerning Deprivation of Procedural Due Process Itself Deprived Appellant of Due Process.

Each of the aforementioned three allegations concerning procedural due process made to the California Supreme Court by appellant in the petition for a writ of review, if proven, would have constituted a denial of due process.[4]

Certainly the failure of the California Supreme Court to bring up the Commission's record so that it could review

4. *Air Transp. Ass'n of America v. Hernandez* (D.C., D.Col., 1967) 264 F. Supp. 227, 231-32; *NRLB v. Phelps,* (C.A. 5, 1943) 136 F. 2d 562, 563-64; *Texaco, Inc. v. Federal Trade Com'n,* (C.A., D.Col. 1964) 336 F. 2d 754; *Amos Treat & Co. v. Securities & Exchange Com'n* (C.A., D.Col., 1962) 306 F. 2d 260; *In re Murchison,* 349 U.S. 133 (1955); *NRLB v. Washington Dehydrated Food Co.,* (C.A. 9, 1941) 118 F. 2d 980, 996; *Interstate Com. Comm'n v. Louisville & N.R.R.,* 227 U.S. 88 (1913); *Illinois Cent. R.R. v. Railroad Comm'n of Kentucky,* (D.C., E.D. Ky. 1924) 1 F. 2d 805; *Ohio Bell Tel. Co. v. Public Utilities Comm'n of Ohio,* 301 U.S. 292 (1937); and *Pointer v. Texas,* 380 U.S. 400 (1965).

the truth of these allegations violates section 1760, California Public Utilities Code, *supra*, p. 5, which states:

> "In any proceeding wherein the validity of any order or decision is challenged on the ground that it violates any right of petitioner under the Constitution of the United States, the Supreme Court shall exercise an independent judgment on the law and the facts, and the findings or conclusions of the commission material to the determination of the constitutional question shall not be final."

We submit further, however, that such failure under the so-called "constitutional fact" doctrine deprived appellant of the due process. That doctrine, broadly speaking, is to the effect that where an administrative agency has made a determination on factual matters relating to basic constitutional rights, the party affected is entitled, as a matter of due process of law, to an independent judicial weighing of the truth of such facts. This doctrine was first enunciated with respect to the fact of confiscation in cases involving the quasi-legislative function of utility ratemaking. *Ohio Valley Co. v. Ben Avon Borough*, 253 U.S. 287, 289 (1920); *St. Joseph Stock Yards Co. v. U.S.*, 298 U.S. 38 (1936). In the following excerpt from its decision in the latter case this Court indicated the reasons for the doctrine and that it was one of general application and not limited to quasi-legislative determination, thus (p. 52):

> "Legislative agencies, with varying qualifications, work in a field peculiarly exposed to political demands. Some may be expert and impartial, others subservient. It is not difficult for them to observe the requirements of law in giving a hearing and receiving evidence. But to say that their findings of fact may be made conclusive where constitutional rights of liberty and property are involved, although the evidence clearly establishes that the findings are wrong and constitutional

rights have been invaded, is to place those rights at the mercy of administrative officials and seriously to impair the security inherent in our judicial safeguards. That prospect, with our multiplication of administrative agencies, is not one to be lightly regarded. It is said that we can retain judicial authority to examine the weight of evidence when the question concerns the right of personal liberty. But if this be so, it is not because we are privileged to perform our judicial duty in that case and for reasons of convenience to disregard it in others. The principle applies when rights either of person or of property are protected by constitutional restrictions. Under our system there is no warrant for the view that the judicial power of a competent court can be circumscribed by any legislative arrangement designed to give effect to administrative action going beyond the limits of constitutional authority.This is the purport of the decisions above cited with respect to the exercise of an independent judicial judgment upon the facts where confiscation is alleged."

The reasons for application of the doctrine would appear to be even more cogent in connection with quasi-judicial proceedings such as the present, and it has been extended to that area. *Ng Fung Ho v. White,* 259 U.S. 276 (1922); *Crowell v. Benson,* 285 U.S. 22 (1932). Closely related are a number of decisions under the Railway Labor Act which hold that an employee whose claim has been denied by an adjustment board is entitled to independent judicial review on matters of procedural due process, even though that Act generally precludes judicial review. *Hornsby v. Dobard,* (C.A. 5, 1961) 291 F. 2d 483, 487); *Ellerd v. Southern Pacific Co.,* (C.A. 7, 1957) 241 F. 2d 541, 545; *Sigfred v. Pan American World Airways,* (C.A. 5, 1950), 230 F. 2d 13, 17; *Edwards v. Capital Airlines,* (C.A. D.Col. 1949) 176 F. 2d 755, 760, *cert. denied,* 338 U.S. 885 (1949); *Bower v. Eastern Airlines* (C.A. 3, 1954), 214 F. 2d 623, 626, *cert.*

denied, 348 U.S. 871 (1954); *Union Pacific R. Co. v. Price,* 360 U.S. 601, 616 (1959). In *Hornsby v. Dobard, supra,* the court said, at page 487:

> "This does not, of course, decide the question as to whether the Board's decision may be subject to review or collateral attack because of procedural or other defects amounting to the absence of due process of law. If in the administrative procedures there has been a denial of due process, there is a right to a judicial review of the administrative decision."
>
> * * *
>
> "If it is shown that the union representatives on the Board have such personal interests arising out of their union memberships or employment, or from the agreement between the union and the carrier as would justify an inference of bias or partiality by reason of interest, then the right to a judicial review will not be denied."

II. In Any Event the Availability of Appeal to This Court from the Decision of the California Supreme Court Was Not an Adequate Remedy with Respect to Factual Matters Relating to the Charges of Deprivation of Procedural Due Process So That the District Court's Failure to Review the Truth of These Charges Was an Abuse of Discretion.

Since the California Supreme Court did not bring up for review the Commission's record concerning factual matters relating to these procedural due process issues, the Commission's record is not part of the record which this court can review in reviewing the decision of the California Supreme Court on appeal. Accordingly, we submit that the availability of an appeal to this court was not an adequate legal remedy to secure the required independent judicial review of these factual matters, as the district court apparently thought, and the district court consequently abused its equitable discretion in refusing to review the record of

the Commission's proceedings on these charges to ascertain whether they were true.

III. & IV. California Statutes Giving the Commission Power to Punish for Contempt Violate the Due Process Clause of the Fourteenth Amendment, and This Is Especially True in View of the Absence of Jury Trial.

These same issues are raised in the pending appeal to this Court from the decision of the California Supreme Court in No. 1050. The substantiality of these two questions is pointed out at pages 5-8 of appellant's jurisdictional statement in that case, and will not be repeated here.

CONCLUSION

For the foregoing reasons the Court should note jurisdiction of this appeal and set the substaantial federal constitutional issues raised for formal argument.

Respectfully submitted,

ROBERT L. PIERCE
JOHN MACDONALD SMITH
ROBERT S. BOGASON

By ROBERT L. PIERCE

Counsel for Appellant Southern Pacific Company

CERTIFICATE OF SERVICE

I, ROBERT L. PIERCE, one of the attorneys for SOUTHERN PACIFIC COMPANY, Petitioner herein, and a member of the Bar of the Supreme Court of the United States, hereby certify, pursuant to Rule 33(3)(b) of the Revised Rules of the Supreme Court of the United States, that on the 12th day of March, 1969, I served a copy of the foregoing Notice of Appeal to the Supreme Court of the United States as follows:

On all counsel of record for the CALIFORNIA PUBLIC UTILITIES COMMISSION, PETER E. MITCHELL, WILLIAM M. BENNETT, A. W. GATOV, WILLIAM SYMONS, JR., and FRED P. MORRISSEY, as members of, and constituting said Commission, at the offices of the COMMISSION, California State Building, San Francisco, California 94102; THOMAS C. LYNCH, at Fifth Street and Capitol Mall, Sacramento, California; JOHN J. FERDON, at 850 Bryant Street, San Francisco, California; KEITH C. SORENSON, at Hall of Justice and Records, Redwood City, California; and LOUIS P. BERGNA, at 190 W. Hedding, San Jose, California, by mailing a copy, in a duly addressed envelope, first class, postage prepaid, to each such party.

Dated at San Francisco, California, this 12th day of March, 1969.

ROBERT L. PIERCE

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San Francisco, Calif. 94105

(Appendices Follow)

Appendix A

Decision No. 74006

Before the Public Utilities Commission of the State of California

City of San Carlos, a Municipal corporation, *Complainant,* vs. Southern Pacific Company, a corporation, *Defendant.*	Case No. 8697 (Filed October 10, 1967)
Investigation on the Commission's own motion into the Rates, Charges, Rules, Operations, Practices, Contracts, Leases, Service and Facilities of all the vehicular parking areas adjacent to railroad stations between San Francisco and San Jose, California, owned or controlled by Southern Pacific Company.	Case No. 8700 (Filed October 10, 1967)

CONTEMPT PROCEEDING

Alan C. Furth and *John MacDonald Smith,* for Southern Pacific Company, respondent.

Richard D. Gravelle, Counsel for the Commission staff.

OPINION

On November 15, 1967, the Commission issued an order requiring Southern Pacific Company to appear and show cause, if any it had, why it should not be adjudged to be in contempt of the Commission for failing to comply with

certain provisions of a Commission order dated October 10, 1967, as amended by Decision No. 73251 dated October 24, 1967.

Public hearing on the Order to Show Cause was held on November 30, 1967 and December 21, 1967, at San Francisco, with the matter being submitted on the latter date.

The record indicates that by its order dated October 10, 1967, the Commission instituted an investigation into the operations of all vehicular parking areas adjacent to the railroad stations between San Francisco and San Jose, California, owned or controlled by Southern Pacific Company to determine the reasonableness of parking charges recently imposed or about to be imposed by Southern Pacific Company. Pending such investigation the order restrained Southern Pacific Company from charging or collecting parking tolls at any of its parking areas, adjacent to its tracks, between San Francisco and San Jose. By Decision No. 73251, dated October 24, 1967, following oral argument, the restraining order was modified by excluding therefrom the parking areas located at San Francisco and Mountain View; however, Southern Pacific Company was ordered to charge no more than 25 cents at the Mountain View lot. Decision No. 73251 also required respondent to remove or cover all rental signs and rental equipment from the parking areas made subject to the restraining order as amended.

The order of October 10, 1967, was served upon respondent by registered mail on October 12, 1967, and became effective on November 1, 1967. A copy of Decision No. 73251 was served upon respondent by registered mail on October 27, 1967, and the order became effective on October 30, 1967.

An affidavit in support of the Order to Show Cause was prepared by an employee of the Commission and was introduced as a part of Exhibit C-1. It was his testimony that he visited the parking areas herein considered on November 2, 3, 6, 7 and 8, 1967, and personally observed 44 separate and distinct violations of the Commission's restraining order, as amended. The witness testified that he personally purchased parking lot tickets and observed others purchasing tickets at the various lots. He further testified that respondent had failed to cover the rental signs and rental equipment at said parking areas. The witness also testified that he observed individuals paying 35 cents for parking lot tickets at the Mountain View area.

Respondent made no affirmative showing, but its President appeared pursuant to a subpoena and testified that upon being advised by counsel that the Commission's restraining order was invalid he personally made the decision on behalf of respondent not to comply with said order and that respondent continued its program of collecting parking fees notwithstanding the Commission's order to the contrary.

The record further indicates that the State Supreme Court of the State of California took the following course of action with respect to petitions and an application filed by respondent as a result of the Commission's restraining order:

(1) November 8, 1967, denied respondent's petition for a writ of prohibition.
(2) November 29, 1967, denied respondent's petition for a writ of prohibition and application for a stay of the Commission's restraining order.
(3) December 20, 1967, denied respondent's petition for a writ of review of the Commission's restraining order.

Findings

The Commission finds as follows:

1. Southern Pacific Company is a public utility "railroad corporation" within the meaning of Section 230 of the Public Utilities Code and subject to the jurisdiction of this Commission.

2. On October 10, 1967, this Commission issued an order restraining Southern Pacific Company from charging or collecting parking tolls at any of its parking areas adjacent to its tracks between San Francisco and San Jose pending further order of the Commission. A copy of said order was served upon Southern Pacific Company by registered mail on October 12, 1967, and became effective on November 1, 1967.

3. By Decision No. 73251, dated October 24, 1967, the Commission amended its order of October 10, 1967 and deleted therefrom the parking areas located at San Francisco and Mountain View, and in addition limited the parking charge at Mountain View to 25 cents. Said decision also required Southern Pacific Company to remove or cover all rental signs and rental equipment. A copy of Decision No. 73251 was served upon Southern Pacific Company by registered mail on October 27, 1967, and the order became effective on October 30, 1967.

4. On November 2, 3, 6, 7 and 8, 1967, an employee of the Commission visited the parking areas covered by the Commission's restraining order and personally observed 44 separate instances wherein Southern Pacific Company had failed to comply with the Commission's restraining order dated October 10, 1967, as amended by Decision No. 73251.

5. On November 15, 1967, the Commission by Decision No. 73352 issued an order requiring Southern Pacific Company to appear before Commissioner Bennett or Examiner

Daly on November 30, 1967, at the Commission's Courtroom in San Francisco and then and there show cause, if any it had, why it should not be adjudged to be in contempt of this Commission and punished therefor in the manner prescribed by law for the 44 separate and distinct offenses of alleged contempt set forth in the affidavit attached to the Order to Show Cause. A copy of said Order to Show Cause and copies of documents in support thereof were personally served upon an officer of Southern Pacific Company on November 15, 1967.

6. During the course of hearing upon the Order to Show Cause the President of Southern Pacific Company admitted that he was fully aware of the restraining order of the Commission, understood the content and nature thereof, but personally decided on behalf of Southern Pacific Company, not to comply with said order and that said company did in fact collect and continue to collect, as of December 21, 1967, parking charges at the parking areas covered by the Commission's restraining order of October 10, 1967, as amended.

7. Southern Pacific Company at all the times mentioned herein did not, and now does not, specify rates and charges in its schedules filed with the Commission and in effect at such times applicable to the parking charges collected by it at the parking areas covered by the Commission's restraining order of October 10, 1967, as amended; nor was Southern Pacific Company during any of such times authorized by the Commission to assess and collect such charges.

8. The restraining order of October 10, 1967, as amended, has been in effect at all times since November 1, 1967.

9. The Supreme Court of the State of California on three separate occasions since November 8, 1967 has denied to Southern Pacific Company writs of prohibition and re-

view and an application for a stay of the Commission's order of October 10, 1967, as amended.

10. Southern Pacific Company willfully, intentionally and flagrantly failed to comply with the Commission's restraining order of October 10, 1967, as amended, on the 44 separate and distinct instances as set forth in the affidavit in support of the Order to Show Cause in Exhibit C-1 of this proceeding.

Conclusions

1. Southern Pacific Company in willfully and intentionally failing to comply with the Commission's restraining order of October 10, 1967, as amended, on the 44 separate and distinct instances referred to in Finding 10 above is in contempt of the Commission.

2. Southern Pacific Company should be fined the sum of $500 for each of such 44 instances, in the total amount of $22,000, in the manner set forth in the following order.

3. Southern Pacific Company should be directed to formulate and file a plan with the Commission to refund all moneys collected by it as parking charges at the parking areas here involved from November 2, 1967 to the effective date of this order.

A recommended decision was presented to the Commission by Commissioner Bennett. Some revisions were made therein by the Commission, including an additional finding, conclusion and ordering paragraphs. In order that such recommended decision may be available to the parties, a copy thereof is attached hereto (Attachment "A").

ORDER

It is ordered that:

1. Southern Pacific Company is hereby adjudged to be in contempt of the Commission's restraining order dated October 10, 1967, as amended by Decision No. 73251 for

failing to comply therewith on the 44 separate and distinct occasions as set forth in the affidavit in support of the Order to Show Cause as evidenced by Exhibit C-1 in this proceeding.

2. Southern Pacific Company, within ten days of the effective date hereof, shall formulate and file with the Commission a plan whereby it will refund parking charges to those persons from whom Southern Pacific Company, without authority from the Commission, collected them in connection with the parking areas named in the order of October 10, 1967, as amended. Such plan shall provide, among other things, that claimants for refunds shall have a period of ninety days, from May 7, 1968, the date upon which Southern Pacific Company shall cause to be published and posted a "Notice of Refund" in an appropriate place, to establish and file their claims.

3. Southern Pacific Company shall pay to the Commission a fine in the amount of $22,000. Such sums as Southern Pacific Company shall pay out, pursuant to a plan referred to in paragraph 2 hereof and which plan will have been approved by the Commission, shall be credited against said fine. The entire amount of the fine remaining unpaid shall in any event be paid within ten days after the expiration of the ninety day period hereinabove mentioned.

The Secretary of the Commission shall cause a copy of this order to be personally served upon Southern Pacific Company and the effective date of this order shall be twenty days after such service.

Dated at San Francisco, California, this 16th day of April, 1968.

PETER E. MITCHELL
President
WILLIAM SYMONS, JR.
FRED P. MORRISSEY
Commissioners

Attachment "A"

Decision No. .....

Before the Public Utilities Commission of the State of California

City of San Carlos, a Municipal corporation, *Complainant,* vs. Southern Pacific Company, a corporation, *Defendant.*	Case No. 8697 (Filed October 10, 1967)
Investigation on the Commission's own motion into the Rates, Charges, Rules, Operations, Practices, Contracts, Leases, Service and Facilities of all the vehicular parking areas adjacent to railroad stations between San Francisco and San Jose, California, owned or controlled by Southern Pacific Company.	Case No. 8700 (Filed October 10, 1967)

CONTEMPT PROCEEDING

Alan C. Furth and *John MacDonald Smith,* for Southern Pacific Company, respondent.

Richard D. Gravelle, Counsel for the Commission staff.

OPINION

On November 15, 1967, the Commission issued an order requiring Southern Pacific Company to appear and show cause, if any it had, why it should not be adjudged to be in contempt of the Commission for failing to comply with certain provisions of a Commission order dated October

10, 1967, as amended by Decision No. 73251 dated October 24, 1967.

Public hearing on the Order to Show Cause was held before Commissioner Bennett and Examiner Daly on November 30, 1967 and December 21, 1967, at San Francisco, with the matter being submitted on the latter date.

The record indicates that by its order dated October 10, 1967, the Commission instituted an investigation into the operations of all vehicular parking areas adjacent to the railroad stations between San Francisco and San Jose, California, owned or controlled by Southern Pacific Company to determine the reasonableness of parking charges recently imposed or about to be imposed by Southern Pacific Company. Pending such investigation the order restrained Southern Pacific Company from charging or collecting parking tolls at any of its parking areas, adjacent to its tracks, between San Francisco and San Jose. By Decision No. 73251, dated October 24, 1967, following oral argument, the restraining order was modified by excluding therefrom the parking areas located at San Francisco and Mountain View; however, Southern Pacific Company was ordered to charge no more than 25 cents at the Mountain View lot. Decision No. 73251 also required respondent to remove or cover all rental signs and rental equipment from the parking areas made subject to the restraining order as amended.

The order of October 10, 1967, was served upon respondent by registered mail on October 12, 1967, and became effective on November 1, 1967. A copy of Decision No. 73251 was served upon respondent by registered mail on October 27, 1967, and the order became effective on October 30, 1967.

An affidavit in support of the Order to Show Cause was prepared by an employee of the Commission and was intro-

duced as a part of Exhibit C-1. It was his testimony that he visited the parking areas herein considered on November 2, 3, 6, 7 and 8, 1967, and personally observed 44 separate and distinct violations of the Commission's restraining order, as amended. The witness testified that he personally purchased parking lot tickets and observed others purchasing tickets at the various lots. He further testified that respondent had failed to cover the rental signs and rental equipment at said parking areas. The witness also testified that he observed individuals paying 35 cents for parking lot tickets at the Mountain View area.

Respondent made no affirmative showing, but its President appeared pursuant to a subpoena and testified that upon being advised by counsel that the Commission's restraining order was invalid he personally made the decision on behalf of respondent not to comply with said order and that respondent continued its program of collecting parking fees notwithstanding the Commission's order to the contrary.

The record further indicates that the State Supreme Court of the State of California took the following course of action with respect to petitions and an application filed by respondent as a result of the Commission's restraining order:

(1) November 8, 1967, denied respondent's petition for a writ of prohibition.

(2) November 29, 1967, denied respondent's petition for a writ of prohibition and application for a stay of the Commission's restraining order.

(3) December 20, 1967, denied respondent's petition for a writ of review of the Commission's restraining order.

Findings

After consideration the Commission finds as follows:

1. Southern Pacific Company is a public utility "railroad corporation" within the meaning of Section 230 of the Public Utilities Code and subject to the jurisdiction of this Commission.

2. On October 10, 1967, this Commission issued an order restraining Southern Pacific Company from charging or collecting parking tolls at any of its parking areas adjacent to its tracks between San Francisco and San Jose pending further order of the Commission. A copy of said order was served upon Southern Pacific Company by registered mail on October 12, 1967, and became effective on November 1, 1967.

3. By Decision No. 73251, dated October 24, 1967, the Commission amended its order of October 10, 1967 and deleted therefrom the parking areas located at San Francisco and Mountain View, and in addition limited the parking charge at Mountain View to 25 cents. Said decision also required Southern Pacific Company to remove or cover all rental signs and rental equipment. A copy of Decision No. 73251 was served upon Southern Pacific Company by registered mail on October 27, 1967, and the order became effective on October 30, 1967.

4. On November 2, 3, 6, 7 and 8, 1967, an employee of the Commission visited the parking areas covered by the Commission's restraining order and personally observed 44 separate instances wherein Southern Pacific Company had failed to comply with the Commission's restraining order dated October 10, 1967, as amended by Decision No. 73251.

5. On November 15, 1967, the Commission by Decision No. 73352 issued an order requiring Southern Pacific Com-

pany to appear before Commissioner Bennett or Examiner Daly on November 30, 1967, at the Commission's Courtroom in San Francisco and then and there show cause, if any it had, why it should not be adjudged to be in contempt of this Commission and punished therefor in the manner prescribed by law for the 44 separate and distinct offenses of alleged contempt set forth in the affidavit attached to the Order to Show Cause. A copy of said Order to Show Cause and copies of documents in support thereof were personally served upon an officer of Southern Pacific Company on November 15, 1967.

6. During the course of hearing upon the Order to Show Cause the President of Southern Pacific Company admitted that he was fully aware of the restraining order of the Commission, understood the content and nature thereof, but personally decided on behalf of Southern Pacific Company, not to comply with said order and that said company did in fact collect and continue to collect, as of December 21, 1967, parking charges at the parking areas covered by the Commission's restraining order of October 10, 1967, as amended.

7. The restraining order of October 10, 1967, as amended, has been in effect at all times since November 1, 1967.

8. The Supreme Court of the State of California on three separate occasions since November 8, 1967 has denied to Southern Pacific Company writs of prohibition and review and an application for a stay of the Commission's order of October 10, 1967, as amended.

Conclusion

Southern Pacific Company willfully, intentionally and flagrantly failed to comply with the Commission's restrain-

ing order of October 10, 1967, as amended, on the 44 separate and distinct instances as set forth in the affidavit in support of the Order to Show Cause in Exhibit C-1 of this proceeding.

During the course of hearing Southern Pacific Company filed a petition to disqualify Commissioner Bennett. The Commission denied the petition, but the denial will be affirmed in the ensuing order.

ORDER

It is ordered that:

1. Southern Pacific Company is hereby adjudged to be in contempt of the Commission's restraining order dated October 10, 1967, as amended by Decision No. 73251 for failing to comply therewith on the 44 separate and distinct occasions as set forth in the affidavit in support of the Order to Show Cause as evidenced by Exhibit C-1 in this proceeding and within ten days after the effective date of this order shall pay to this Commission a fine in the amount of twenty-two thousand dollars ($22,000).

2. The petition of Southern Pacific Company to disqualify Commissioner William M. Bennett is hereby denied.

The Secretary of the Commission shall cause a copy of this order to be personally served upon Southern Pacific Company and the effective date of this order shall be twenty days after such service.

Dated at ....., California, this ..... day of ....., 1968.

Commissioner Gatov Dissenting:

It is my opinon that Southern Pacific Company wilfully and intentionally failed to comply with the Commission's Restraining Order of October 10, 1967 (as amended) on

forty-four separate and distinct instances, and is in contempt of the Commission.

Further, it is my opinion that Southern Pacific Company should be fined in the sum of $500.00 for each of the forty-four instances, or a total amount of $22,000.00.

I do not concur in the order of the majority of the Commission in this case.

/s/ A. W. Gatov
Commissioner

Dated: San Francisco, California,
April 16, 1968

William M. Bennett, Commissioner, Dissenting Opinion

This case had its genesis in proceedings before this Commission concerned with establishing a reasonable fee applicable to Peninsula parking lots owned and operated by the Southern Pacific Company. On November 6, 1967, counsel for Southern Pacific in public hearing before this Commission in Case 8697 was candid in stating on the record that the Southern Pacific Company would not comply with a restraining order previously issued by this Commission on October 10, 1967, and signed by Commissioners Mitchell, Gatov and Symons. Southern Pacific took the position at that time and even during the proceedings herein that the restraining order of the Commission was invalid. Even repeated refusals by the Supreme Court of the State of California to nullify such order was disregarded by the Southern Pacific.

The refusal of the Southern Pacific Company was so notorious that undoubtedly this explains the failure of that company to present any testimony whatsoever by way of a defense to the proceedings initiated or by way of mitigation for its contemptuous action. Southern Pacific conducted

itself with an air of certainty almost as though it had suddenly become immune to the jurisdiction and process of this Commission.

But for the candor of Southern Pacific counsel in freely admitting to violation of the Commission's orders, this matter would not have come to the Commission. It is most curious, perplexing and beyond explanation that neither the staff of this Commission, the Director of Transportation nor the Chief Counsel brought to our attention the disregard by Southern Pacific of a Commission order. Only the frankness of Southern Pacific counsel in the public proceedings apprised us that a lawful order of the Commission was being disobeyed. This is hardly in keeping with the concept of a vigorous, independent staff acting in the public interest. And it is so unlike staff action of recent years when it did exhibit initiative, independence and simply performed statutory duty. We can well ask why staff personnel knowing of Southern Pacific's disregard for a Commission order chose to remain silent. I think it correct to state that but for the information supplied by Southern Pacific counsel as to the railroad's disregard for a lawful order that there never would have been knowledge of contempt let alone proceedings to impose punishment for contempt.

That the Southern Pacific Company considers itself beyond the reach of this Commission and the Supreme Court of this state is plain. It makes its own determination as to that which is binding upon it and obeys or disobeys accordingly.

The interests of its commuters, the authority of this Commission, the public service obligations of this corporation, all are seemingly of little or no concern to the management of Southern Pacific Company. This corporation should realize as should all other California public utilities

that if regulation is to be ignored, if a permissive regulatory climate is to inhibit the vigor of this Commission, then the public will not be served or protected by this Commission, and the raison d'etre for its being will be gone. And when the public realization becomes widespread and if the historical process repeats itself then the only answer toward control of a public service corporation as here lies in public ownership. And shortsighted management enraptured with profit and indifferent to public need can only hasten that day.

The convenient story of the President of Southern Pacific that he believed counsel's advice that the restraining order was not valid discloses a woeful inadequacy upon the part of Southern Pacific counsel and Southern Pacific management. Obviously this was the testimony that had to be given. Merely giving it does not make it credible. Southern Pacific was here testing the Commission and almost got away with it. The difficulty was however that the contempt was so open and flagrant that it could not be disregarded. The distressing thing here is the spectacle of management totally callous toward public responsibilities and indifferent to the obligations of law.

Some comments are in order. The order of my brethren ruling upon my qualifications is irrelevant, unnecessary and beyond their power. As a Commissioner I take my authority from the constitution—not from my colleagues. Further, I had thought that the California Supreme Court had clearly determined this matter when they denied the efforts of the Southern Pacific Company to disqualify me from the case.

Concerning the parking lot decision the majority embarks upon a most curious discussion concerning the tax liability of California railroads. The record is quite clear that

Southern Pacific has a tax expense associated with each parking lot which is the subject of today's order. Heretofore the Commission has always recognized that a public utility whether it be a railroad corporation or other is entitled in the rate fixing process to compensation for taxes paid. And further in the parking lot decision in this Commission dated June 20, 1967, Decision No. 72615 the majority which is now reversing itself found specifically that SP is entitled to recoup *taxes*, assessments, improvements and maintenance of parking lots. Not only is the Commission disregarding its recently enunciated parking lot order but it is disregarding all of the regulatory concepts which heretofore have been considered well established, as part of the rate fixing process of this Commission. We are prompted to wonder why. Today's order insofar as it relates to the parking lots merely sets aside the decision of an impartial examiner who heard the fresh testimony and who judged the credibility of witnesses and the majority arbitrarily rewrites the decision. In seeking to reach some unformulated goal or objective the majority of necessity does violence to basic regulatory principles and law. Does the majority actually hold by this decision that there is question as to whether taxes are an operating expense in a rate proceeding? So far as the staff position is concerned there is no evidence whatsoever from the staff rebutting in any wise the hard fact that Southern Pacific has a tax liability upon each parking lot.

Turning to the contempt proceeding the Commission has mixed two cases terribly. There is nothing whatsoever even by employment of the single word "refund"—about refunds in the contempt case. The opinion in the contempt case which is judicial in nature is supposed to be based upon the order to show cause, the allegations of contempt associ-

ated therewith and only the evidence pertaining to these matters adduced at public hearing. There is nothing in the contempt proceedings about refunds and therefore it is improper for the Commission to be mixing parking charges, refunds, and a punitive fine in one composite order. The staff has advised us that the contempt order is erroneous in presenting for the first time and in the ultimate majority decision discussion of refunds.

There is, however, a sly benefit to the Southern Pacific by the intrusion of the irrelevancy of refunds. Southern Pacific well knows that refunds are not part of a contempt order. And all today's majority order does is to defer and to place in doubt a specific fine of $22,000. Southern Pacific is required to set up some type of plan detailing the manner in which it shall refund parking charges. And the logical question arises at this point whether or not Southern Pacific is to base a refund plan upon Examiner Daly's original decision which provides for a 35 cent daily parking charge or whether the refund plan is to be based upon the majority's tentative daily charge of 25 cents. Standing plain in all of this is the fact that the 25 cent daily charge of the majority is not final in that the majority parking lot decision sets the matter down for further testimony to decide the tax issue and upon resolution of that issue conceivably the parking lot charge will, unless we abandon all past regulatory precedent, revert to the 35 cent charge which includes taxes as proposed by the examiner herein originally.

There is nothing in the majority order which covers the period of refunds by way of termination and all today's majority orders do is to defer any real decision either on parking lot charges or by way of imposing a $22,000 fine now for perhaps the most flagrant contempt ever visited

upon this body. Further, the confusion contained in today's contempt order whether deliberate and calculated by way of deliberate error to constitute reversal error on an appeal or whether coming from lack of expertise in the regulatory field has the same end result. And that end result is that nothing is being done to Southern Pacific. The Commission has given the Southern Pacific a beautiful error as the basis for rehearing—indeed the majority being placed upon notice of the deliberate error were quick to point out that Southern Pacific could ask for a rehearing.

One wonders whether or not the contempt order as it has been doctored and diluted by the extraneous element of refunds and as it has been rewritten has in fact given the Southern Pacific due process. My brethren do not seem to realize that contempt is a judicial proceeding and because of the penalties involved rights are to be scrupulously observed. The handling of today's orders is unique. Apparently now parties before us are to be treated to the copycat decision. And the Commission at least to its credit advertises the pure results of an impartial examiner and then illustrates its absolute power by arbitrarily assigning a decision to an examiner who never heard a line of testimony and to a commissioner who did not set on even one day's hearing. Southern Pacific is to be congratulated. A friendly Commission can achieve its ends either by an outright bold favor or if they be too much for public consumption then it can write a decision and place in it very carefully and deliberately a finding and a procedure here concerning refunds which constitutes in my opinion the basis of a successful appeal. Better then a friend of the court utilities now are served by friends at the court.

The decisions proposed by Examiner Daly were the ones which should be signed. In short, Southern Pacific should be

ordered to pay and at once a $22,000 fine. Their contempt was notorious, flagrant, self-serving and illustrative of a consistent public be damned attitude. As to the parking lot charges if the Commission does not know that since 1912 we have allowed taxes as an operating expense, they are free to wend their way through that concept and to arrive inevitably at the result contained in the examiner's original report. Southern Pacific today by the gentle treatment accorded them now has a license to be indifferent, arrogant and, if necessary, contemptuous.

/s/ WILLIAM M. BENNETT
Commissioner

Dated: San Francisco, California
April 16, 1968

Appendix B

Mary Moran Pajalich
Roderick B. Cassidy
Timothy B. Treacy
Gordon A. Johnson
Public Utilities Commission
of the State of California
5072 State Building
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Telephone: (415) 557-0336
Attorneys for Defendants

Original Filed Nov 18 1968

In the United States District Court
for the Northern District of California

No. 50166

Southern Pacific Company, a Delaware Corporation,
Plaintiff,

vs.

Public Utilities Commission of the State of California; Peter E. Mitchell, William M. Bennett, A. W. Gatov, William Symons, Jr., and Fred P. Morrissey, as members of, and constituting said Commission; Thomas C. Lynch; John J. Ferdon; Keith C. Sorenson; and Louis K. Bergna,
Defendants.

ORDER GRANTING MOTION TO DISMISS

The motion for an order to dismiss by defendant Public Utilities Commission of the State of California and the

motion for an order granting a preliminary injunction by plaintiff Southern Pacific Company having come on for hearing this day before a Three-Judge Court, and the Court being fully advised,

It Is Ordered that the motion to dismiss by the defendant Public Utilities Commission of the State of California be granted.

It Is Further Ordered that the motion for a preliminary injunction by plaintiff Southern Pacific Company be denied.

Dated: Nov 14 1968

LLOYD H. BURKE
United States District Judge

O. D. HAMLIN
United States District Judge

ALBERT C. WOLLENBERG
United States District Judge

Appendix C

ORDER DENYING WRIT OF REVIEW

S.F. No. 22610

In the Supreme Court of the State of California

In Bank

Southern Pacific Company

v.

Public Utilities Commission

Petition for writ of review DENIED.

Filed Sep 25 1968 William I. Sullivan, Clerk

By JSR

S.F. Deputy

TRAYNOR

Chief Justice

LIBRARY
SUPREME COURT, U. S.

FILED
APR 23 1969
JOHN F. DAVIS, CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1968

No. 1152

SOUTHERN PACIFIC COMPANY, a corporation,
Appellant,

vs.

THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA,
Appellee.

On Appeal from the United States District Court for the Northern District of California

Motion to Affirm

MARY MORAN PAJALICH
RODERICK B. CASSIDY
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GARY L. HALL
5072 State Building
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In the Supreme Court of the United States

OCTOBER TERM, 1968

No. 1152

SOUTHERN PACIFIC COMPANY, a corporation,
Appellant,

vs.

THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA,
Appellee.

On Appeal from the United States District Court for the Northern District of California

Motion to Affirm

Appellee, the Public Utilities Commission of the State of California ("Commission"), hereby moves to affirm the judgment of the District Court on the grounds that the questions presented are so insubstantial as to not warrant any further argument.

OPINIONS BELOW

The Opinion and Order of the Public Utilities Commission of the State of California in Decision No. 74006 are dated April 16, 1968. Copies thereof are printed in Appendix A of appellant's Jurisdictional Statement. The final order of the Supreme Court of the State of California,

S.F. No. 22610, issued September 25, 1968, which reviewed the Commission's Order, is reported in the Advance California Reports, 69 A.C. No. 9, page 1 of the Minutes, and is printed in Appendix C of appellant's Jurisdictional Statement. The Order of the United States District Court for the Northern District of California granting appellee's Motion to Dismiss was issued November 14, 1968. A copy of said Order is printed in Appendix B of appellant's Jurisdictional Statement. Notice of Appeal was timely filed January 14, 1969. Appellant's Jurisdictional Statement was received by appellee on March 27, 1969.

JURISDICTION

Appellant seeks to invoke the jurisdiction of this Court under 28 U.S.C. § 1253 which provides for the direct appeal to the United States Supreme Court from a decision rendered by a three-judge district court constituted under 28 U.S.C. §§ 2281 and 2284.

STATUTES INVOLVED

Certain of the statutes involved, namely Sections 1756-1760 of the California Public Utilities Code, are set forth at pages 3-5 of appellant's Jurisdictional Statement. Other statutes involved are Article XII, Section 22, of the California Constitution; Sections 312, 2110, and 2113 of the California Public Utilities Code; Sections 1209-1222 of the California Code of Civil Procedure; and Sections 166 of the California Penal Code, all of which are attached hereto as Appendix A.

QUESTIONS PRESENTED

The questions, as set forth by appellant, are not accurately or correctly presented. Based upon the record before the various tribunals involved herein, and the decisions of

those tribunals, the questions before this Court may be stated as follows:

(1) Is the California Supreme Court required to bring up the entire record before it decides whether a writ of review should be issued or not?

(2) Is a federal district court required to review the entire record of a proceeding before a state regulatory agency before it determines that the constitutional issues are so insubstantial as not to require the convening of a three-judge court?

(3) Can a state agency with plenary powers derived directly from the Constitution of the State of California, including the power to punish for contempt, exercise its constitutional contempt power (implemented by its statutory contempt power) to adjudge a party guilty of *civil contempt,* and impose *civil sanctions* pursuant to such judgment, after a hearing has been afforded such party, without violating the due process of law requirements of the Fourteenth Amendment to the Federal Constitution?

(4) Is a trial by jury necessary, in order to fulfill the due process requirements of the Fourteenth Amendment to the Constitution of the United States, in a state administrative agency proceeding before a party can be adjudged in civil contempt for failure to obey an order of that agency?

STATEMENT OF THE CASE

Appellant, a common carrier by railroad, operates a commuter passenger service between San Francisco and San Jose, California. It sought to charge parking fees for automobiles using its parking lots adjacent to the stations along the route between those two points. The Commission issued a temporary restraining order on October 10, 1967, directing petitioner to refrain from collecting the parking

charges pending further order of the Commission. Appellant sought a writ of prohibition from the California Supreme Court to enjoin the Commission from enforcing the restraining order, but the writ was denied November 8, 1967. Appellant also sought a writ of review of the Commission's order from the California Supreme Court which was denied December 20, 1967.

In a third proceeding before the California Supreme Court appellant filed a petition for a writ of prohibition to enjoin the Commission from entertaining a contempt proceeding based on appellant's alleged noncompliance with the October 10th order. Simultaneously appellant sought judicial stay of the order. This petition for the writ and stay was denied November 29, 1967.

The Commission, in the meantime, had issued its order in Decision No. 73352, dated November 14, 1967, which directed appellant to show cause why it should not be held in contempt for refusal to comply with the Commission's order, which appellant admits (Juris. Stat. p. 4) was demonstrated by its actions during the period of November 2 through November 8, 1967. The contempt hearing was held before a Commissioner and Examiner on November 30 and December 21, 1967 in the usual manner pursuant to authority conferred by the California Constitution in Article XII, Section 22, and in California Public Utilities Code Section 2113. On April 16, 1968, the Commission issued its decision (Decision No. 74006, Appendix A, Juris. Stat.) finding appellant in contempt of the Commission and ordering it to pay a fine of $22,000. Apellant filed a petition for rehearing on April 26, 1968, which was denied by the Commission by Decision No. 74174, dated May 28, 1968.

Pursuant to Sections 1756-1770, California Public Utilities Code, appellant petitioned the California Supreme

Court for a writ of review, contending *inter alia* that: (1) the delegation of *criminal contempt* powers to state administrative agencies was a *per se* violation of appellant's right to due process of law under the Fourteenth Amendment of the United States Constitution and (2) that the finding of appellant in contempt of the Commission, without affording appellant a trial by jury, was in contravention of the Fourteenth Amendment of the Constitution of the United States.

On September 25, 1968, the California Supreme Court issued its order affirming the Commission's decision holding appellant in contempt by denying appellant's petition for writ of review. Appellant then filed an action in the Federal District Court of the Northern District of California, No. 50166, wherein it sought, by convening a three-judge court, to have the Commission's constitutional and statutory contempt powers declared null and void. This suit was dismissed on November 10, 1968.

Thereafter, appellant filed two separate Jurisdictional Statements seeking this Court's consideration in the first (No. 1050) of the California Supreme Court's denial of a writ of review and in the present docket of the Federal District Court's order granting the motion to dismiss.

ARGUMENT

I

Appellant's contention that the failure of the California Supreme Court to bring before it the record of the Commission's proceedings denied appellant due process is completely unwarranted and not substantiated by the cases cited therein. Appellant seems to imply that Section 1760 of the California Public Utilities Code grants a petitioning party the right to a trial *de novo* before the California

Supreme Court. However, contrary to appellant's reasoning, the effect of Section 1760 is that the "determination of the constitutional question [by the Commission] shall not be final," and within that context the California Supreme Court is free to rule on the constitutional issue presented.

The fallacy of appellant's argument is that there is no rule of procedure which prevents or restricts the petitioner from attaching or appending any or all of the record of the Commission's proceeding to the petition for writ of review. Indeed, dissatisfied parties seeking review of Commission orders at times include substantial portions of the Commission record in their petitions for review. It does not appear feasible or expedient to require a state supreme court to bring before it the entire record of an agency proceeding prior to deciding whether the writ should be issued.

It is also anomalous for appellant (petitioner before the California Supreme Court) to have sought review before the California Supreme Court and now, disappointed in the outcome of that proceeding, to assert before this Court that the California Supreme Court erred in not considering matters before the Commission which appellant could have easily brought before that Court.[1]

II

In reference to appellant's second "question presented," it is not clear exactly what contention appellant is attempting to bring thereby before this Court. If appellant's contention is that its appeal from the California Supreme

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1. In fact, appellant's petition for writ of review before the California Supreme Court comprised more than 85 pages, which included a memorandum of points and authorities, several exhibits, and several excerpts from the Commission record.

Court is an inadequate remedy because the record of the Commission's proceeding was not before the California Supreme Court, then appellant, as set forth above, has only itself to blame for the "inadequateness" of its remedy.

If, on the other hand, it is appellant's contention that the federal district court should have reviewed the record of the Commission proceedings, then appellant has completely misconstrued the purpose of a three-judge court constituted under 28 U.S.C., Sections 2281 and 2284. The purpose of a three-judge court is to provide a responsible forum for an authoritative determination in the litigation of suits, which, if successful, would render void state statutes embodying important state policies. (*Swift & Co. v. Wickham,* 382 U.S. 111, 86 S. Ct. 258, 15 L. Ed. 2d 194 (1965); *Zemel v. Rusk,* 381 U.S. 1, 85 S. Ct. 1271, 14 L. Ed. 2d 179 (1965).)

The convening of a three-judge court is not neeessary when the claim of unconstitutionality is "wholly insubstantial, legally speaking, nonexistence," or, in other words, essentially fictitious. (*Bailey v. Patterson,* 369 U.S. 31, 82 S. Ct. 549, 7 L. Ed. 2d 512 (1962); *Ex parte Poresky,* 290 U.S. 30, 54 S. Ct. 3, 78 L. Ed. 152 (1933).) The proceeding before the federal district court below more than satisfied the due process requirements, in that when a motion is made to convene a three-judge court, one judge determines if there is some plausible chance of success. If this determination is in the affirmative, then the constitutional issues are presented to the three-judge court. (*Ex parte Poresky, supra; Glancy v. Parole Bd. of Mich. Dept. of Corrections,* 287 F. Supp. 34 (D.C. Mich., 1968); *Lamont v. Commissioner of Motor Vehicles,* 269 F. Supp. 880 (D.C. N.Y. 1967).) In the proceeding below, *three* judges heard appellant's motion to convene a three-judge court, and there-

after dismissed the motion. It can only be assumed that the three judges determined that the constitutional issues were so insubstantial as to not warrant further hearing.

It appears that appellant was desirous of having the record of the Commission proceedings brought before both the California Supreme Court and the federal district court because of the alleged bias of one commissioner. In an attempt to illustrate this alleged bias, appellant extracted from the Commission record a statement by that commissioner (this excerpt appears at page 10 of appellant's Jurisdictional Statement), but in so doing appellant has taken this statement completely out of context.[2]

It is well settled in California that such opinions, expressed from the bench, do not constitute bias or prejudice which would require disqualification in order to conform with the due process requirements.

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2. "Examiner Daly: But out of curiosity Mr. Smith, I would like to have a statement from you as to what the status of these lots is at the present time.

"Mr. Smith: The status of the lots at the present time is the same as it was on October 10 when the Commission first purported to act, namely, that for those lots that a parking, pay parking program has been instituted, charges still being collected. The program, however, is frozen as of October 10th.

* * *

"Commissioner Bennett: So, you are disregarding the Commission's order? I would like it yes or no, because the question is clear. You are disregarding the Commission's order, are you not?

"Mr. Smith: Mr. Commissioner, when you put out a valid order we will obey.

"Commissioner Bennett: You are disregarding this order which you determined is invalid?

"Mr. Smith: We have—

"Commissioner Bennett: You do not consider yourself in contempt of this Commission?

"Mr. Smith: No, sir, we do not.

"Commissioner Bennett: Well, so far as I am concerned, I would recommend to the full Commission that we find the Southern Pacific in full contempt; but we will take that up with the Commission tomorrow." (This is the only part of the record that appellant ever quotes.)

> "From these authorities the rule appears to be that when the state of mind of the trial judge appears to be adverse to one of the parties but is based upon actual observance of the witnesses and the evidence given during the trial of an action, it does not amount to that prejudice against a litigant which disqualifies him in the trial of the action. . . ."

(*Kreling v. Superior Court,* 25 Cal. 2d 305, 312 (1944); *Huntington v. Crowley,* 64 Cal. 2d 647 (1966); see also *Federal Trade Com. v. Cement Institute,* 333 U.S. 683, 68 S. Ct. 793, 92 L. Ed. 1010 (1947).)

In any event an allegation that bias or prejudice has denied appellant its constitutional rights is of itself no basis to convene a three-judge court. The purpose of a three-judge court, as stated above, is that *one* judge may not have the power to declare a state statute or order unconstitutional. However, a distinction is made between the unconstitutionality of a statute as generally applied, (*Phillips v. U.S.,* 312 U.S. 246, 61 S. Ct. 480, 85 L. Ed. 800 (1940)), and where the attack is on the unconstitutionality of the result obtained by the use of such state statute. (*Overy v. U.S.,* 316 U.S. 486, 62 S. Ct. 1122, 86 L. Ed. 1616 (1942).) In the latter instance the convening of a three-judge court is not proper.

III

In one broad sweep, appellant is seeking to strike down the contempt powers of the Commission conferred upon it by constitutional and statutory provisions. In support thereof, appellant has reached back 75 years for the dictum of a case (*Interstate Commerce Commission v. Brimson,* 154 U.S. 447, 485 (1894)), which initiated the "spirit of decisions" of this Court. However, appellant fails to

acknowledge that this Court in *Brimson* upheld the I.C.C.'s right to petition to enforce its own subpoena in a court, and to compel Brimson to testify, in order that the agency might be aided in carrying out the duties imposed on it by Congress.

Though jurisdiction in federal contempt matters arising from federal administrative orders has now been lodged with the federal courts by statute, this procedure has merely resulted in the federal court determining whether or not the administrative agency has performed its functions properly. If so, the federal court must enforce the agency's orders. (*National Labor Relations Board v. Warren Co.*, 350 U.S. 107, 112-113 (1955).)

Contrary to apellant's interpretation of the dictum in *Brimson*, this Court has long approved the grant of judicial powers to state administrative agencies. (*Consolidated Rendering Co. v. Vermont*, 207 U.S. 541, 552 (1908); *Carfer v. Caldwell*, 200 U.S. 293 (1906).) By state constitutional and statutory provisions the Commission has been granted the power to "punish for contempt in the same manner and to the same extent as courts of records . . . ." (Calif. Const., Art. XII, § 22; Public Utilities Code §§ 312 and 2113.) Thus, it is evident, and it has been so held, that the Commission is not strictly an administrative and legislative tribunal, but rather it does "possess well established and well understood judicial power." (*People v. Western Air Lines, Inc.*, 42 Cal. 2d 621, 632, 268 P. 2d 723 (1954), dismissed 348 U.S. 859, 75 S. Ct. 87, 99 L. Ed. 677.)

IV

According to appellant, the "spirit of decisions" created by *Brimson* was culminated by this Court's decisions in *Bloom v. Illinois*, 391 U.S. 194, 88 S. Ct. 1477, 20 L. Ed 2d

522 (1968), and *Duncan v. Louisiana,* 391 U.S. 145, 88 S. Ct. 1444, 20 L. Ed. 2d 491 (1968), requiring a jury trial in criminal proceedings. It is appellant's contention that this requirement of a jury trial should be extended to the Commission's contempt proceedings. But again appellant's proposition cannot be substantiated, for appellant has failed to recognize the basic distinction between civil and criminal contempt. This distinction is provided by statute in California, whereby the courts prosecute civil contempt proceedings under California Code of Civil Procedure Sections 1209-1222 and criminal contempt proceedings under California Penal Code Section 166. The former provisions are not for the punishment of an offense against the state but rather to implement the "inherent power of the court to conduct the business of the court and enforce the lawful orders of the court." (*Pacific Tel. & Tel. Co. v. Superior Court,* 265 A.C.A. 985, 987 (1968), citing *Bridges v. Superior Court,* 14 Cal. 2d 464, 94 P. 2d 983 (1939).)

This same basic distinction between civil and criminal contempt proceedings is made in regard to the contempt powers granted to the Commission. If the Commission had intended to proceed against appellant in a criminal action, it would have asked a district attorney to proceed to prosecute for the violation of the Commission's orders, which is made a misdemeanor by Section 2110 of the California Public Utilities Code, and which sets forth a definite punishment of a fine ($1,000) or imprisonment (not to exceed one year), or both.

Even if *Bloom* and *Duncan* were held applicable to the Commission's order, this Court held in a subsequent case that the principle referred to in those cases would not be applied retroactively. (*De Stefano v. Woods,* 392 U.S. 631, 634-635, 20 L. Ed. 2d 1308 (1968).)

"For these reasons we will not reverse state convictions for failure to grant jury trial where trials began prior to May 20, 1968, the date of this Court's decision in Duncan v. Louisiana and Bloom v. Illinois."[3]

CONCLUSION

Appellant, in prosecuting this appeal and the appeal from the California Supreme Court in No. 1050, has attempted to relate interchangeably the issues presented in the two appeals. In fact, for two of its arguments, appellant's Jurisdictional Statement attempts to incorporate part of the Jurisdictional Statement in No. 1050. Apparently, appellant has recognized the futility of these appeals, because in referring to the appeal from the California Supreme Court appellant has completely disregarded the purpose of a three-judge court, and that the process of appeals from the latter court and a state supreme court are two very separate and distinct remedies which do not encompass the same issues.

Appellant acknowledges [at page 13 of its Jurisdictional Statement] that one of the reasons the federal district court may have dismissed its action was because of the availability of an already existing avenue of judicial review. One of the functions of a three-judge court is to expedite important litigation and to provide a more authoritative forum when considering the constitutionality of a state statute or policy. (*Swift & Co. v. Wickham,* 382 U.S. 111, 86 S. Ct. 258, 15 L. Ed. 2d 194 (1965).) The attempt to convene a three-judge court has not expedited litigation, nor could it have provided a more authoritative forum than a direct appeal to the United States Supreme Court from the California Supreme Court.

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3. The order by the Commission finding appellant in contempt was issued April 16, 1968.

It thus becomes clearly evident that appellant is "grasping at straws," searching for some legal remedy that does not exist. Appellant for over a year and a half has attempted to invoke the jurisdiction of any and every forum that would listen to it, and in the process each forum has summarily dismissed appellant's suits. Appellant has at last reached the final arbiter and again it can only be simply stated: Appellant has not presented any substantial constitutional question that warrants further hearing. Therefore, the decision of the federal district court should be affirmed.

Respectfully submitted,

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Attorneys for Appellee
The Public Utilities
Commission of the
State of California

(Appendix A Follows)

Appendix A

28 United States Code

§ 1253. Direct appeals from decisions of three-judge courts

Except as otherwise provided by law, any party may appeal to the Supreme Court from an order granting or denying, after notice and hearing, an interlocutory or permanent injunction in any civil action, suit or proceeding required by any Act of Congress to be heard and determined by a district court of three judges.

§ 2281. Injunction against enforcement of State statute; three-judge court required

An interlocutory or permanent injunction restraining the enforcement, operation or execution of any State statute by restraining the action of any officer of such State in the enforcement or execution of such statute or of an order made by an administrative board or commission acting under State statutes, shall not be granted by any district court or judge thereof upon the ground of the unconstitutionality of such statute unless the application therefor is heard and determined by a district court of three judges under section 2284 of this title.

§ 2284. Three-judge district court; composition; procedure

In any action or proceeding required by Act of Congress to be heard and determined by a district court of three judges the composition and procedure of the court, except as otherwise provided by law, shall be as follows:

(1) The district judge to whom the application for injunction or other relief is presented shall constitute one member of such court. On the filing of the application, he shall immediately notify the chief judge of the circuit, who shall designate two other judges, at least one of whom shall

be a circuit judge. Such judges shall serve as members of the court to hear and determine the action or proceeding.

(2) If the action involves the enforcement, operation or execution of State statutes or State administrative orders, at least five days notice of the hearing shall be given to the governor and attorney general of the State.

* * * * * * *

Such notice shall be given by registered mail or by certified mail by the clerk and shall be complete on the mailing thereof.

(3) In any such case in which an application for an interlocutory injunction is made, the district judge to whom the application is made may, at any time, grant a temporary restraining order to prevent irreparable damage. The order, unless previously revoked by the district judge, shall remain in force only until the hearing and determination by the full court. It shall contain a specific finding, based upon evidence submitted to such judge and identified by reference thereto, that specified irreparable damage will result if the order is not granted.

(4) In any such case the application shall be given precedence and assigned for a hearing at the earliest practicable day. Two judges must concur in granting the application.

(5) Any one of the three judges of the court may perform all functions, conduct all proceedings except the trial, and enter all orders required or permitted by the rules of civil procedure. A single judge shall not appoint a master or order a reference, or hear and determine any application for an interlocutory injunction or motion to vacate the same, or dismiss the action, or enter a summary or final judgment. The action of a single judge shall be reviewable by the full court at any time before final hearing.

A district court of three judges shall, before final hearing, stay any action pending therein to enjoin, suspend or restrain the enforcement or execution of a State statute or order thereunder, whenever it appears that a State court of competent jurisdiction has stayed proceedings under such statute or order pending the determination in such State court of an action to enforce the same. If the action in the State court is not prosecuted diligently and in good faith, the district court of three judges may vacate its stay after hearing upon ten days notice served upon the attorney general of the State.

California Public Utilities Code

312. The commission and each commisisoner may issue writs of summons, subpoenas, warrants of attachment, warrants of commitment, and all necessary process in proceedings for contempt, in like manner and to the same extent as courts of record. The process issued by the commission or any commissioner, extends to all parts of the State and may be served by any person authorized to serve process of courts of record, or by any person designated by the commission or a commissioner. The person executing any such process shall receive such compensation as is allowed by the commission, not to exceed the fees prescribed by law on August 8, 1915, for similar services, and such fees shall be paid in the same manner as provided in this part for payment of the fees of witnesses.

2110. Every public utility and every officer, agent, or employee of any public utility, who violates or fails to comply with, or who procures, aids, or abets any violation by any public utility of any provision of the Constitution of this state or of this part, or who fails to comply with any part of any order, decision, rule, direction, demand, or requirement of the commission, or who procures, aids, or

abets any public utility in such violation or noncompliance in a case in which a penalty has not otherwise been provided is guilty of a misdemeanor and is punishable by a fine not exceeding one thousand dollars ($1,000), or by imprisonment in a county jail not exceeding one year, or by both such fine and imprisonment.

2113. Every public utility, corporation, or person which fails to comply with any part of any order, decision, rule, regulation, direction, demand, or requirement of the commission or any commissioner is in contempt of the commission, and is punishable by the commission for contempt in the same manner and to the same extent as contempt is punished by courts of record. The remedy prescribed in this section does not bar or affect any other remedy prescribed in this part, but is cumulative and in addition thereto.

California Code of Civil Procedure

§ 1209. Acts or omissions constituting

The following acts or omissions in respect to a court of justice, or proceedings therein, are contempts of the authority of the court:

1. Disorderly, contemptuous, or insolent behavior toward the judge while holding the court, tending to interrupt the due course of a trial or other judicial proceeding;

2. A breach of the peace, boisterous conduct, or violent disturbance, tending to interrupt the due course of a trial or other judicial proceedings;

3. Misbehavior in office, or other wilful neglect or violation of duty by an attorney, counsel, clerk, sheriff, coroner, or other person, appointed or elected to perform a judicial or ministerial service;

4. Abuse of the process or proceedings of the court, or falsely pretending to act under authority of an order or process of the court;

5. Disobedience of any lawful judgment, order, or process of the court;

6. Rescuing any person or property in the custody of an officer by virtue of an order or process of such court;

7. Unlawfully detaining a witness, or party to an action while going to, remaining at, or returning from the court where the action is on the calendar for trial;

8. Any other unlawful interference with the process or proceedings of a court;

9. Disobedience of a subpena duly served, or refusing to be sworn or answer as a witness;

10. When summoned as a juror in a court, neglecting to attend or serve as such, or improperly conversing with a party to an action, to be tried at such court, or with any other person, in relation to the merits of such action, or receiving a communication from a party or other person in respect to it, without immediately disclosing the same to the court;

11. Disobedience by an inferior tribunal, magistrate, or officer, of the lawful judgment, order, or process of a superior court, or proceeding in an action or special proceeding contrary to law, after such action or special proceeding is removed from the jurisdiction of such inferior tribunal, magistrate, or officer.

No speech or publication reflecting upon or concerning any court or any officer thereof shall be treated or punished as a contempt of such court unless made in the immediate presence of such court while in session and in such a manner as to actually interfere with its proceedings.

§ 1211. Summary punishment; order; affidavit or statement of facts

When a contempt is committed in the immediate view and presence of the court, or of the judge at chambers, it may be punished summarily; for which an order must be made, reciting the facts as occurring in such immediate view and presence, adjudging that the person proceeded against is thereby guilty of a contempt, and that he be punished as therein prescribed.

When the contempt is not committed in the immediate view and presence of the court, or of the judge at chambers, an affidavit shall be presented to the court or judge of the facts constituting the contempt, or a statement of the facts by the referees or arbitrators, or other judicial officers.

§ 1212. Warrant of attachment; issuance; order to show cause; warrant of commitment

When the contempt is not committed in the immediate view and presence of the court or judge, a warrant of attachment may be issued to bring the person charged to answer, or, without a previous arrest, a warrant of commitment may, upon notice, or upon an order to show cause, be granted; and no warrant of commitment can be issued without such previous attachment to answer, or such notice or order to show cause.

§ 1218. Determination of guilt; fine; imprisonment

Upon the answer and evidence taken, the court or judge must determine whether the person proceeded against is guilty of the contempt charged, and if it be adjudged that he is guilty of the contempt, a fine may be imposed on him not exceeding five hundred dollars ($500), or he may be imprisoned not exceeding five days, or both; provided, however, that in justice courts the judge may punish by

fine or imprisonment or both, such fine not to exceed, in any case, one hundred dollars ($100), and such imprisonment one day; the conviction, specifying particularly the offense, and the judgment thereon, must be entered in the docket.

§ 1222. Conclusiveness of judgments and orders

The judgment and orders of the court or judge, made in cases of contempt, are final and conclusive.

California Penal Code

§ 166. Criminal contempts; conduct constituting

CRIMINAL CONTEMPTS. Every person guilty of any contempt of Court, of either of the following kinds, is guilty of a misdemeanor:

1. Disorderly, contemptuous, or insolent behavior committed during the sitting of any Court of justice, in immediate view and presence of the Court, and directly tending to interrupt its proceedings or to impair the respect due to its authority;

2. Behavior of the like character committed in the presence of any referee, while actually engaged in any trial or hearing, pursuant to the order of any Court, or in the presence of any jury while actually sitting for the trial of a cause, or upon any inquest or other proceedings authorized by law;

3. Any breach of the peace, noise, or other disturbance directly tending to interrupt the proceedings of any Court;

4. Willful disobedience of any process or order lawfully issued by any Court;

5. Resistance willfully offered by any person to the lawful order or process of any Court;

6. The contumacious and unlawful refusal of any person to be sworn as a witness; or, when so sworn, the like refusal to answer any material question;

7. The publication of a false or grossly inaccurate report of the proceedings of any Court;

8. Presenting to any Court having power to pass sentence upon any prisoner under conviction, or to any member of such Court, any affidavit or testimony or representation of any kind, verbal or written, in aggravation or mitigation of the punishment to be imposed upon such prisoner, except as provided in this Code.

California Constitution

Article XII

Sec. 22.

* * * * * * *

The commisison shall have the further power to examine books, records and papers of all railroad and other transportation companies; to hear and determine complaints against railroad and other transportation companies; to issue subpenas and all necessary process and send for persons and papers; and the commisison and each of the commissioners shall have the power to administer oaths, take testimony and punish for contempt in the same manner and to the same extent as courts of record; the commission may prescribe a uniform system of accounts to be kept by all railroad and other transportation companies.

SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
MAY 2 1969
JOHN F. DAVIS, CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1968

No. 1152

SOUTHERN PACIFIC COMPANY, a Delaware Corporation,
Appellant,

vs.

PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA; PETER E. MITCHELL, WILLIAM M. BENNETT, A. W. GATOV, WILLIAM SYMONS, JR., and FRED P. MORRISSEY, as members of, and constituting said Commisison; THOMAS C. LYNCH; JOHN J. FERDON; KEITH C. SORENSON; and LOUIS K. BERGNA,
Appellees.

On Appeal from the United States District Court for the Northern District of California

Appellant's Brief in Opposition to Motion to Affirm

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ARGUMENT

I. Substantial Issues are Raised by Appellant's Contentions that Failure of the California Supreme Court to Review the Commission's Record on Factual Issues Relating to Alleged Violations of Procedural Due Process Deprived it of Due Process of Law, and that the District Court Abused its Discretion in Failing to Review the Commission's Record on these Issues.

It is appellant's position that due process required that the California Supreme Court bring up the record before

the Commission in the contempt hearing and independently review it to ascertain the truth of the facts relating to the several charges of deprivation of procedural due process in connection with such hearing made in appellant's application for a writ of review. Appellant also contends that the right of this Court to review such issues on an appeal from the California Supreme Court was an inadequate remedy since the record on appeal would not contain the Commission's record. Accordingly, appellant asserts that the District Court erred in summarily dismissing its complaint, in which it raised these same issues of procedural due process, apparently solely because the court thought the appellate remedy adequate, and that its failure to consider these issues on the Commission's record was an abuse of discretion.

In answer to the first contention, appellee Commission, in its motion to affirm, apparently does not deny that an independent judicial review of the Commission's record was required, but alleges (pp. 6-7) that there was no rule of procedure which precluded appellant from attaching the Commission's record to its petition for a writ of review, and that accordingly it has only itself to blame for any inadequacy of its remedy. Appellee is in error in assuming that the procedure relating to review of orders of the Commission by writ of certiorari (now labeled writ of review) as prescribed by statute contemplated that appellant could attach the Commission's record as an appendix to its application for a writ of review, or that if it did, any consideration would be given to it. Attached, as Appendix A, are the provisions of the Public Utilities Code (sections 1756-1760) relating to writs of review with respect to Commission orders and, as Appendix B, the provisions of the Code of Civil Procedure (sections 1067-1076) relating to writs of

review generally. The latter is also applicable, since section 1758 of the Public Utilities Code states:

> "The provisions of the Code of Civil Procedure relating to writs of review shall, so far as applicable and not in conflict with the provisions of this part, apply to proceedings instituted in the Supreme Court under the provisions of this article."

It is evident under both sets of statutory provisions that the method of procedure is carried out in two steps; first, consideration of the application by the court to determine whether the writ shall issue, which if issued itself requires the Commission or lower court to transmit a certified copy of the record (section 1756, Public Utilities Code and section 1071, Code of Civil Procedure), and then a hearing on the merits on the record as transmitted. Here the California Supreme Court never got beyond the first stage, since it summarily refused the writ, which would have commanded the Commission to certify and transmit its record. It would have been idle for appellant to have attached the record as an uncertified appendix to its application for the writ, since the rule is well settled in California that appellate courts cannot consider provisions of the record, uncertificated, and attached as an appendix to an appellate brief. *Peri v. Culley,* 126 Cal. App. 602, 604 (1932). It is to be noted that California makes a distinction as to whether the uncertified record may be attached to an application for an extraordinary writ between writs of review involved here and writs of mandate used for reviewing orders of other administrative agencies. With respect to the latter section 1094.5 of the Code of Civil Procedure provides:

> "All or part of the record of the proceedings before the inferior tribunal, corporation, board or officer may be filed with the petition, may be filed with respondent's points and authorities, or may be ordered to be filed by the court."

Contrary to appellee's contention, p. 7, we believe the three-judge district court did have jurisdiction to review the Commission's record in connection with the issues of procedural due process. Where issues such as these, which do not require a three-judge court, are joined with an attack on the constitutionality of a state statute, as was the case here in connection with the attack on the delegation of contempt powers to the Commission, a three-judge court may assume jurisdiction. *Florida Lime Growers v. Jacobsen,* 362 U.S. 73 (1960). Assuming that the Court does not agree with us that the delegation of contempt powers to the Commission is unconstitutional, we think we are still constitutionally entitled to a judicial review of the issues of procedural due process in the light of the Commission's record by a lower appellate court. This could be accomplished by remanding the case either to a single judge federal district court or to the California Supreme Court, whose order denying the writ of review is under review by this Court in No. 1050.

Appellee, urges, p. 8, that the alleged bias of Commissioner Bennett was not such as to constitute a violation of procedural due process. It is our position, however, that the merits of our contentions as to violation of procedural due process are not in issue at this stage. In any event this is only one of three such issues raised both before the California Supreme Court and the District Court.

II. Substantial and Novel Issues are Also Raised by Appellant's Contentions that the Granting of Contempt Power to the Commission and the Granting of Criminal Contempt Power to the Commission in Non-petty Cases Without a Jury Trial Violated the Due Process Clause of the Fourteenth Amendment

Appellee's motion in this case, pp. 3-12, adds little with respect to these issues to what was said by appellee in its

motion to dismiss or affirm the appeal in No. 1050. The Court is referred to our brief in opposition (pp. 2-11) in No. 1050, which, we believe, effectively answers in detail all of appellee's contentions and demonstrates that both these issues are substantial and novel.

Essentially appellee still urges that this is a civil rather than a criminal contempt. That, of course, is immaterial on the issue of whether contempt power may be delegated to the Commission at all, under the rule of *Interstate Commerce Commission v. Brimson,* 158 U.S. 447, 485 (1894). While the issue of whether the contempt is civil or criminal is pertinent to the issue of jury trial, we submit that whether a contempt is criminal or civil depends on whether its purpose is remedial (civil) or punitive (criminal). This was the rule enunciated in *Gompers v. Bucks Stove & Range Co.,* 221 U.S. 418, 441 (1911). By that standard the present contempt was clearly criminal. We do not agree with appellee's assertion, p. 11, that whether a contempt is criminal or civil depends on whether the Commission proceeds under the Civil Code or the Penal Code. The one case cited by appellant, *Pacific Tel. & Tel. Co. v. Superior Court,* 265 A.C.A. 985 (1968) does not support this conclusion. There the California District Court of Appeal held (p. 908) that a contempt proceeding brought under the civil code did not require a jury trial under *Bloom v. Illinois,* 391 U.S. 194 (1968) and *Duncan v. Louisiana,* 391 U.S. 145 (1968), because the matter was a "petty offense" within the exceptions in those cases. Since the court would not have found it necessary to consider this exception if it had thought the matter one of civil contempt, it is evident that it did not do so. While the penalty the court was referring to there was, as here, that involved in section 1218 of the Code of Civil Procedure, the court's holding that a petty offense was

involved there is certainly not applicable here. There the court was referring merely to the basic language of the section which permits a fine of $500 or an imprisonment of not exceeding five days. Here, in contrast, the Commission treated each of 44 chargings of fees as separate counts and assessed a fine of $22,000. On this approach, on the same theory, since the same parking fee was assessed by appellant against hundreds of other motorists during this period, the Commission could have with impunity just as well have assessed a tremendous fine and imprisoned officers of appellant for five days for each individual car that a parking fee was collected.

CONCLUSION

Since all of the issues raised by this appeal are clearly novel and substantial the Court should note jurisdiction and set the case for formal argument.

Respectively submitted,

ROBERT L. PIERCE
JOHN MACDONALD SMITH
ROBERT S. BOGASON

Robert L. Pierce

Counsel for Appellant
Southern Pacific
Company

CERTIFICATE OF SERVICE

I, ROBERT L. PIERCE, one of the attorneys for SOUTHERN PACIFIC COMPANY, Petitioner herein, and a member of the Bar of the Supreme Court of the United States, hereby certify, pursuant to Rule 33(3)(b) of the Revised Rules of the Supreme Court of the United States, that on the 1st day of May, 1969, I served a copy of the foregoing Brief in opposition to motion to affirm as follows:

On all counsel of record for the CALIFORNIA PUBLIC UTILITIES COMMISSION, PETER E. MITCHELL, WILLIAM M. BENNETT, A. W. GATOV, WILLIAM SYMONS, JR., and FRED P. MORRISSEY, as members of, and constituting said Commission, at the offices of the COMMISSION, California State Building, San Francisco, California 94102; THOMAS C. LYNCH, at Fifth Street and Capitol Mall, Sacramento, California; JOHN J. FERDON, at 850 Bryant Street, San Francisco, California; KEITH C. SORENSON, at Hall of Justice and Records, Redwood City, California; and LOUIS P. BERGNA, at 190 W. Hedding, San Jose, California, by mailing a copy, in a duly addressed envelope, first class, postage prepaid, to each such party.

Dated at San Francisco, California, this 1st day of May, 1969.

Robert L. Pierce

65 Market Street
San Francisco, Calif. 94105

Attorney for Southern Pacific Company

(Appendices Follow)

§ 1756. Writ of certiorari

Within 30 days after the application for a rehearing is denied, or, if the application is granted, then within 30 days after the decision on rehearing, the applicant may apply to the Supreme Court of this State for a writ of certiorari or review for the purpose of having the lawfulness of the original order or decision or of the order or decision on rehearing inquired into and determined. The writ shall be made returnable *at a time and place then or thereafter specified by court order* and shall direct the commission to certify its record in the case to the court *within the time therein specified.*

§ 1757. Scope of review

No new or additional evidence may be introduced in the Supreme Court, but the cause shall be heard on the record of the commission as certified to by it. The review shall not be extended further than to determine whether the commission has regularly pursued its authority, including a determination of whether the order or decision under review violates any right of the petitioner under the Constitution of the United States or of this State. The findings and conclusions of the commission on questions of fact shall be final and shall not be subject to review except as provided in this article. Such questions of fact shall include ultimate facts and the findings and conclusions of the commission on reasonableness and discrimination.

§ 1758. Appearances; judgment; applicability of Code of Civil Procedure

The commission and each party to the action or proceeding before the commission may appear in the review pro-

ceeding. Upon the hearing the Supreme Court shall enter judgment either affirming or setting aside the order or decision of the commission. The provisions of the Code of Civil Procedure relating to writs of review shall, so far as applicable and not in conflict with the provisions of this part, apply to proceedings instituted in the Supreme Court under the provisions of this article.

§ 1759. Jurisdiction

No court of this State, except the Supreme Court to the extent specified in this article, shall have jurisdiction to review, reverse, correct, or annul any order or decision of the commission or to suspend or delay the execution or operation thereof, or to enjoin, restrain, or interfere with the commission in the performance of its official duties, except that the writ of mandamus shall lie from the Supreme Court to the commission in all proper cases.

§ 1760. Constitutional questions

In any proceeding wherein the validity of any order or decision is challenged on the ground that it violates any right of petitioner under the Constitution of the United States, the Supreme Court shall exercise an independent judgment on the law and the facts, and the findings or conclusions of the commission material to the determination of the constitutional question shall not be final.

Appendix B

California Code of Civil Procedure

§ 1067. Writ of certiorari denominated writ of review

The writ of certiorari may be denominated the writ of review.

§ 1068. Courts which may grant writ; circumstances authorizing grant

A writ of review may be granted by any court, except a municipal or justice court, when an inferior tribunal, board, or officer, exercising judicial functions, has exceeded the jurisdiction of such tribunal, board, or officer, and there is no appeal, nor, in the judgment of the court, any plain, speedy, and adequate remedy.

§ 1069. Application; notice; order to show cause

The application must be made on the verified petition of the party beneficially interested, and the court may require a notice of the application to be given to the adverse party, or may grant an order to show cause why it should not be allowed, or may grant the writ without notice.

§ 1070. Direction of writ; return

THE WRIT TO BE DIRECTED TO THE INFERIOR TRIBUNAL, ETC. The writ may be directed to the inferior tribunal, Board, or officer, or to any other person having the custody of the record or proceedings to be certified. When directed to a tribunal, the Clerk, if there be one, must return the writ with the transcript required.

§ 1071. Contents

CONTENTS OF THE WRIT. The writ of review must command the party to whom it is directed to certify fully to the Court issuing the writ, at a time and place then or there-

after specified by Court order a transcript of the record and proceedings (describing or referring to them with convenient certainty), that the same may be reviewed by the Court; and requiring the party, in the meantime, to desist from further proceedings in the matter to be reviewed.

§ 1072. Stay of proceedings; discretion; effect

PROCEEDINGS IN INFERIOR COURT MAY BE STAYED, OR NOT. If a stay of proceedings be not intended, the words requiring the stay must be omitted from the writ; these words may be inserted or omitted, in the sound discretion of the Court, but if omitted, the power of the inferior Court or officer is not suspended or the proceedings stayed.

§ 1073. Service

SERVICE OF THE WRIT. The writ must be served in the same manner as a summons in civil action, except when otherwise expressly directed by the Court.

§ 1074. Scope of review

THE REVIEW UNDER THE WRIT, EXTENT OF. The review upon this writ cannot be extended further than to determine whether the inferior tribunal, Board, or officer has regularly pursued the authority of such tribunal, Board, or officer.

§ 1075. Perfection of defective return; hearing; judgment

A DEFECTIVE RETURN OF THE WRIT MAY BE PERFECTED. HEARING AND JUDGMENT. If the return of the writ be defective, the Court may order a further return to be made. When a full return has been made, the Court must hear the parties, or such of them as may attend for that purpose, and may thereupon give judgment, either affirming or annulling, or modifying the proceedings below.

§ 1076. Judgment; transmission of copy to inferior tribunal, etc.

COPY OF THE JUDGMENT MUST BE SENT TO THE INFERIOR TRIBUNAL. A copy of the judgment, signed by the Clerk, must be transmitted to the inferior tribunal, Board, or officer having the custody of the record or proceeding certified up.

SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
MAY 28 1969
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. 1050

SOUTHERN PACIFIC COMPANY, *Appellant,*
v.
PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA, *Appellee.*

On Appeal From the Supreme Court of California

and No. 1152

SOUTHERN PACIFIC COMPANY, *Appellant,*
v.
PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA, ET AL., *Appellees.*

On Appeal From the United States District Court for the Northern District of California

PETITION FOR REHEARING

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May 28, 1969

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

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PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA, ET AL., *Appellees.*

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PETITION FOR REHEARING.

Appellant prays that this Court grant rehearing of its order of May 5, 1969, in Docket No. 1050, granting appellee's motion to dismiss and dismissing the appeal and that the Court note probable jurisdiction of the appeal, as prayed for in the jurisdictional statement filed February 14, 1969, herein. Appellant also prays that this Court grant rehearing of its order of May 5, 1969, in Docket No. 1152, granting appellees' motion to affirm and affirming the judgment, and that the

Court note probable jurisdiction of the appeal, as prayed for in the jurisdictional statement filed March 12, 1969, herein. Because these cases arise out of the same proceeding and because they involve substantially the same issues, the cases will be discussed together.

REASONS FOR GRANTING REHEARING AND NOTING PROBABLE JURISDICTION

On May 19, 1969, two weeks after the decisions in the instant cases, the Supreme Court decided *Frank* v. *United States,* —— U.S. —— (37 Law Week 4437). Although the Court affirmed the criminal contempt conviction there involved, the Court's opinion clarified the guidelines for determining whether particular criminal contempts are "petty" offenses. These guidelines are relevant here.[1] In *Frank* the Court first explained that the defendant in a criminal contempt case, as in all other criminal cases, "is entitled to a jury trial unless the particular offense can be classified as 'petty'." The Court then stated that "in prosecutions for criminal contempt where no maximum penalty is authorized, the severity of the penalty actually imposed is the best indication of the seriousness of the offense." But "if the statute creating the offense specifies a maximum penalty, then of course that penalty is the relevant period." The Court went on to indicate that a sentence of imprisonment for more than six months would not be "petty." The Court quoted 18 U.S.C. § 1, which defines a petty offense as "any misdemeanor, the penalty for which does not exceed imprisonment for a period of six months *or a fine of not more than $500,* or both . . . ." (Emphasis added.)

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[1] *Frank* involved a contempt of a federal court, but the guidelines are applicable to state contempt proceedings under *Bloom* v. *Illinois*, 391 U.S. 194 (1968).

In the instant cases, appellee California Public Utilities Commission, under its authority to exercise a contempt power "in the manner and to the extent of the judicial power of contempt," is by state statute empowered to impose a penalty of $500 and/or 5 days' imprisonment for contempt. Here, however, the appellee completely avoided the statutory limits on its authority by proliferating the offenses. The alleged contempt consisted of violating one order which purported to require appellant to refrain from imposing fees for parking at its stations; but by adopting the device of counting each car for which a fee was charged as a separate contempt, appellee was able to magnify its power far beyond the petty offense category. It imposed a $22,000 fine, and if it had decided to proceed against appellant's officers individually, under the same reasoning it could have imprisoned them for 7½ months. Indeed by merely counting more cars, this power could have been expanded almost indefinitely—without any requirement of a trial by jury. This would seem to bring the case clearly within the rationale of *Bloom* and *Duncan* v. *Louisiana,* 391 U.S. 145 (1968).[2]

As Justices Black and Douglas stated in their dissent in *Frank* v. *United States:* "Those who commit offenses against courts should be no less entitled to the Bill of Rights than those who commit offenses against the public in general." *A fortiori,* those who commit offenses against administrative agencies should be no

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[2] See *James* v. *Headley,* — F. 2d — (5th Cir. April 9, 1969), a case involving right to counsel in which the Fifth Circuit held that when a state charges a defendant with two or more crimes, for which the maximum sentence is over six months' imprisonment—although none of the charges alone subjects him to a penalty that great—Bill of Rights protections must be afforded. As Judge Wisdom there wrote for a unanimous panel: "If a guilty person is convicted, the sum of the potential penalties is what is important to him—and to society."

worse off, at least in situations where the agency possesses the kind of punitive powers which the California Public Utilities Commission has exercised here.

Absence of a jury trial was not the only procedural defect in these cases. Here the agency issued, ex parte, an order against the appellant without affording any notice or hearing or even an opportunity to see the information on which the order was based. Appellant believed in good faith that the order was void under state law and consequently complied only in part. Under state law, the agency then had the option of going to court to enforce its order (Public Utilities Code § 2101), but it chose instead to proceed by itself. A contempt proceeding was instituted, the result of which was prejudged by at least one agency member, as demonstrated by public accusations he made to newspaper reporters prior to the hearing. At the hearing, the same agency member participated as both prosecutor and presiding officer, and the validity of the order was considered not subject to challenge. This is the procedural foundation on which the $22,000 fine by the agency without a jury trial is based. It cries out for correction. Nonetheless, no court has yet heard the case on the merits,[3] despite the fact that the California Supreme Court's refusal to hear the case is considered a decision on the merits and hence a ratification of appellee's procedures. *People* v. *Western Air Lines,* 42 Cal. 2d 621; 268 P. 2d 723 (1954). Presumably appellee's powers can now be exercised in the same peremptory and indefinitely expandable fashion

[3] Appellee issues approximately 2000 decisions and orders per year. About 20 petitions for review are filed, "and the [California] Supreme Court has granted, on the average, less than two reviews of Commission decisions each year. This means that less than one out of a thousand Commission decisions has been heard by any court in recent years." Francis N. Marshall, Report to the Constitution Revision Committee of the California Legislature (1967).

demonstrated here not only against corporate utilities but also against private individual citizens as well.

In sharp contrast, *Frank* v. *United States* is a good illustration of what happens when a Federal administrative agency seeks to enforce an order. The agency must go to Federal court and seek an injunction. It puts on its case and the defendant has the opportunity to challenge the order, introduce evidence, and cross-examine the agency's witnesses. This way the agency must, in the context of a formal judicial proceeding with attendant procedural safeguards, persuade a judge that its order was proper and that an injunction should issue. Only after this is accomplished and the injunction is violated may the court (not the agency) find the defendant in contempt.

We should also point out again that the state statute in these cases giving the agency the power to punish for contempt is squarely in conflict with the holding of *ICC* v. *Brimson*, 154 U.S. 447, 485 (1894), that an administrative agency may not be invested with the contempt power "consistently with due process of law." The only differences between the cases are that (1) this is criminal contempt, which compels the *Brimson* rationale even more strongly than the civil contempt there involved, and (2) *Brimson,* involving a *Federal* agency, was a question of Fifth Amendment due process, whereas this is Fourteenth. Appellee attempts to cast doubt on *Brimson* by saying that it is on old case. It is, but its holding that Federal administrative agencies may not be given the contempt power has never been questioned. Indeed, this holding has been cited with approval in two recent court of appeals cases: *Chicago* v. *FPC,* 385 F. 2d 629 (D.C. Cir. 1967) (dicta); *Shasta Minerals* v. *SEC,* 328 F. 2d 285 (10th Cir. 1964) (dicta).

We submit: (1) that the large fine imposed and the potential 7½ month imprisonment bring this case under the rationale of *Frank, Bloom*[4] and *Duncan* v. *Louisiana,* 391 U.S. 145 (1968); (2) that the proliferation of offenses, together with the other procedural defects, constitute such an abuse of the contempt power as to violate due process; and (3) that the California statute violates the holding of *Brimson* that an administrative agency may not be invested with the contempt power "consistently with due process of law." For all of these reasons, this Court should agree to hear the case.

CONCLUSION

For the reasons set forth above and in the jurisdictional statements, it is respectfully urged that rehearing be granted and that, upon such rehearing, probable jurisdiction be noted.

Respectfully submitted,

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May 28, 1969

[4] The recitation above of the procedural shortcomings of the agency contempt proceeding is the best explanation of why the statement in *De Stefano* (392 U.S. 631) limiting retroactivity of *Bloom* should not be extended to this case. The procedural safeguards and judicial restraint which preserve the basic elements of fairness in judicial contempt proceedings (even without a jury) are not present in an administrative proceeding such as the present one.

Certificate of Counsel

I hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay.

ROBERT L. PIERCE
Counsel for Appellant

Certificate of Service

I, Robert L. Pierce, one of the attorneys for Southern Pacific Company, appellant herein, and a member of the Bar of the Supreme Court of the United States, hereby certify, pursuant to Rule 33(3)(b) of the Revised Rules of the Supreme Court of the United States, that on the 28th day of May, 1969, I served a copy of the foregoing petition for rehearing as follows:

On all counsel of record for the California Public Utilities Commission, Peter E. Mitchell, William M. Bennett, A. W. Gatov, William Symons, Jr., and Fred P. Morrissey, as members of, and constituting said Commission, at the offices of the Commission, California State Building, San Francisco, California 94102; Thomas C. Lynch, at Fifth Street and Capitol Mall, Sacramento, California; John J. Ferdon, at 850 Bryant Street, San Francisco, California; Keith C. Sorenson, at Hall of Justice and Records, Redwood City, California; and Louis P. Bergna, at 190 W. Hedding, San Jose, California, by mailing a copy, in a duly addressed envelope, first class, postage prepaid, to each such party.

Dated this 28th day of May, 1969.

ROBERT L. PIERCE
Counsel for Appellant